

FEMINA PHARMA INC.,
Plaintiff,
v.
MERCK & CO., INC., SCHERING
PLOUGH CORP, ORGANON USA, INC.,
CVS PHARMACY, INC., WAL-MART
STORES, INC., and WALGREEN CO.
Defendants.

Merck & Co, Inc., Schering Plough Corp, Organon USA, Inc., CVS Pharmacy, Inc., Wal-Mart Stores, Inc., and Walgreen Co. (“Defendants”) move to stay this patent infringement action pursuant to 28 U.S.C. § 1659. Femina Pharma Inc. (“Plaintiff”) does not oppose this motion.

Exhibit A.¹

¹ Exhibits A and B are attached to the Declaration of K. Courtney Macdonald in Support of Defendants' Unopposed Motion to Stay Action Pursuant to 28 U.S.C. § 1659, filed contemporaneously with this Motion.

Plaintiff's complaint with the ITC. A copy of the Notice of Institution of Investigation is attached as Exhibit B.

Section 1659 provides that where "a civil action involving the parties that are also parties to a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930, at the request of a party to the civil action that is also a respondent in the proceeding before the Commission, the district court *shall stay*, until the determination of the Commission becomes final, proceedings in the civil action with respect to any claim that involves the same issues involved in the proceeding before the Commission" if a stay is requested within 30 days of the filing of the district court action. 28 U.S.C. § 1659(a) (emphasis added).

Here, there is no dispute that the mandatory stay under § 1659(a) is available and has been properly sought. Plaintiff filed the Complaint in this action on November 15, 2011 and Defendants seek a stay within the 30 day statutory period. The allegations in the Complaint involve the same patent infringement issues raised in ITC Investigation No. 337-TA-768. Additionally, Defendants are respondents in ITC Investigation No. 337-TA-768.

Defendants therefore request a stay of this civil action in its entirety pending final resolution of ITC Investigation No. 337-TA-785, including any and all appeals. Upon dissolution of the stay of this civil action, the parties agree that Defendants will have thirty (30) days to answer, move or otherwise respond to the Complaint.²

² By specifically appearing for the limited purpose of seeking a stay, Defendants take the position that they do not waive any arguments and retain the right to challenge jurisdiction and venue when the stay is lifted. Plaintiff does not join in this position.

As this Motion is unopposed, the parties waive a hearing. A proposed order is attached as Exhibit 1 to this Motion.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court grant this motion and stay this action in its entirety pursuant to 28 U.S.C. § 1659(a).

Date: December 13, 2011

/s/K. Courtney Macdonald

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*Counsel for Defendants Merck & Co, Inc., Scherin,
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Inc., Wal-Mart Stores, Inc., and Walgreen Co.*

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December 2011, I caused to be electronically filed *Defendants' Unopposed Motion to Stay Action Pursuant to 28 U.S.C. § 1659, Proposed Order Granting Defendants' Unopposed Motion to Stay Action Pursuant to 28 U.S.C. § 1659, and the Declaration of K. Courtney Macdonald (with Exhibits A-B thereto)*, with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Dated: December 13, 2011

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